STATEMENT

After a series of demands and complaints advanced by its wholesale for resale, all-requirements electric utility customers, and negotiations with them extending over a period of at least two years (Petition, at App. 29-32), Boston Edison Company (Edison) on January 29, 1970 filed with the Federal Power Commission increased rates and charges for service to such customers (Rate S-1), requesting an effective date for the new rates of April 1, 1970. The filing data, compiled in accordance with the Commission's Regulations, showed that Edison was receiving a rate of return of 4.4% from this wholesale for resale service under its then current rate and that the new rate would produce an overall return on the business of 6.74% (6.12% on the Municipal Utilities' portion of the business) (Record, at 284, 823). The filing letter noted that "[t]he new rate schedule is designed to distribute the Company's costs of service more equitably between resale customers and ultimate consumers . . ." (Record, at 284).

The Federal Power Act provides that all rates and charges for transactions subject to the jurisdiction of the Federal Power Commission shall be filed with the Commission. Section 205(c). It provides that, unless for good cause the Commission waives the requirement, no change shall be made in filed rates and charges except after thirty days' notice. Section 205(d). Further, it provides that the Commission shall have authority, without answer or formal pleading by the public utility, to enter upon a hearing concerning the lawfulness of a rate change and if it does so, the Commission

> ". . . may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time it would otherwise go into effect; . . .

> in case of a proposed increased rate or charge, the Commission may . . . require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid such portion of such increased rates or charges as by its decision shall be found not justified. . . ." Section 205(e)

By order issued April 29, 1970 (Petition, at App. 26, *et seq.*), the Federal Power Commission permitted Edison's Rate S-1 to go into effect subject to refund after a one-day suspension on May 1, 1970, ruling that Edison's filing was completed thirty-one days earlier, on March 30, 1970.

Petitioners appealed the Federal Power Commission order of April 29, 1970 to the United States Court of Appeals for the District of Columbia, challenging the preliminary treatment accorded by the Commission to Edison's rate increase filing. After reviewing all of the factual allegations of petitioners, the Court below ruled:

> . . . the limited suspension order in this case is not subject to judicial review.
>
> Our ruling that the one-day suspension order is not subject to judicial review, either as to the granting of the one-day suspension or the denial of a five-month suspension . . . is in the context of the kind of claim presented to us—that there has been an abuse of agency discretion. We do not speak to a case where the claim is that the suspension action taken or declined by the agency is plainly without any statutory authority or in defiance of a "clear and mandatory" statutory command or reflects an error evident on the face of the papers—considerations which have been held to constitute an exception, a basis for judicial correction in the case of other types of agency action which Congress has withdrawn from judicial review jurisdiction. We also need not consider whether a basis for this

exception would be established by an agency's failure, evident on the face of the papers, to enter even a one-day suspension order that maintains the agency's ability to require a substantiation of the rate increase and to provide effective refunds for rate increases not substantiated. (footnotes omitted) (Petition, at App. 47-48)

REASONS FOR DENYING THE WRIT

1. The decision of the Court below is in accord with the prior holdings of this Court that the "power of suspension was entrusted to the Commission only". *Board of Railroad Commissioners* v. *Great Northern Ry Co.*, 281 U.S. 412, 429 (1930), *Arrow Transportation Co.* v. *Southern Ry Co.*, 372 U.S. 658, 667 (1963). In *Arrow*, the Court expressly noted the virtual identity of the suspension provisions of section 15(7) of the Interstate Commerce Act there involved with other statutes including section 205(e) of the Federal Power Act, although, of course, since such other statutes were not then before it, the Court stated that its holding with respect to section 15(7) of the Interstate Commerce Act did not "necessarily" govern the construction and application of such other suspension provisions.

2. We can find absolutely no conflict between the holding of the Court below—that the preliminary treatment by the Federal Power Commission of Edison's rate-increase filing, as reflected in the limited suspension order, is not subject to judicial review[1]—and any holdings of other United States Courts of Appeals.

The absolute lack of any conflict between the holding of the Court below and decisions of other circuits is highlighted by *Port of New York Authority* v. *United States*, 451 F. 2d 783 (CA 2, 1971). The Court in that case noted

[1] The Court below carefully excluded from its holding a case where the agency's action is plainly without any statutory authority or in defiance of a clear and mandatory statutory command, or reflects an error evident on the face of the papers.

it is an "unassailable" proposition that the initial decision of whether to suspend the effective date of proposed tariffs is within the sole discretion of the rate regulatory agency. It then considered the sole conflict which at one time did exist whether orders vacating prior suspension orders were reviewable and concluded that even that conflict had been resolved. In that context the Court said:

> "The basis of the decision in *Arrow* that to permit judicial interference with the Commission's suspension procedures would invite the very disruption in the orderly review of the lawfulness of proposed tariffs that Congress meant to preclude applies with equal force to the issue now before us." (451 F. 2d at 788)

There is no conflict between the holding of the Court below and either *Phillips Petroleum Co.* v. *F.P.C.*, 227 F. 2d 470 (CA 10, 1955), *certiorari denied sub nom. Michigan Wisconsin Pipe Line Co.* v. *Phillips Petroleum Co.*, 350 U.S. 1005 (1956) or with anything implicit in *Hunt Oil Co.* v. *F.P.C.*, 398 F. 2d 746 (CA 5, 1968). Neither *Phillips* nor *Hunt* involved any issue argued in the Court below. *Phillips* involved the interpretation of a contract between a gas producer and its customer and the Commission's lack of authority under section 4(e) of the Natural Gas Act to suspend the rate provisions of a contract in effect at the time the Commission first asserted jurisdiction over the sales covered by the contract. The only holding in *Hunt Oil Co.*, either implicit or explicit, involved the legality of any rate suspension at all in connection with an area rate proceeding. The Court below explicitly distinguished the claim before it as not involving a claim that a statutory mandate had been violated. (Petition, at App. 18).

3. The holding of the Court below is sound and represents the only viable interpretation of the statutory scheme of the Federal Power Act.

The Federal Power Act limits the rates and charges which can be imposed by public utilities, such as Edison, to those on file with the Federal Power Commission, subject to the standards of the Act. It does provide a mechanism whereby a public utility may file changes and collect different rates after 30 days notice. Section 205(d).

The Act then vests in the Commission the authority (but not the obligation), after notice of proposed rate change, to order a hearing, "without answer or formal pleading by the public utility," and provides that, if the Commission does order a hearing, the Commission *may* suspend the effectiveness of the new rates for up to 5 months and make the increased rates subject to refund with interest.

The foregoing statutory scheme sets forth the balance established by Congress between public utilities on the one hand and their utility customers on the other. Discretion as to whether a public utility must wait an additional five months before imposing increased charges is given to the Federal Power Commission, but once there is a suspension, the customer is protected against having to pay more than a rate determined to be just and reasonable under the Federal Power Act.[*]

The petitioners seek reversal of the one day suspension order in this case on the basis of factual allegations they made to the Federal Power Commission during the period of time between Edison's filing and the time the Commission had to perform its first act if it wished to provide for hearing, suspension and refund. Evidently petitioners feel that the Commission must initially accept their allegations as true and controlling and suspend the new rate for five

[*] The Court below explicitly did not decide whether the failure of the Commission to enter a suspension order that maintains its ability to require substantiation and to provide effective refunds would constitute the basis for another exception to its basic ruling. (Petition, at App. 18)

months or until the Commission shall have made a final determination on such allegations, if earlier than five months. Petitioners would thus remove the Commission's discretion concerning suspension and confer it on any customer who chose to complain about a proposed increase in rates.

Such is not the statutory scheme of the Federal Power Act, which provides further in the same section, 205(e),

> . . . the Commission shall give to the hearing and decision of such questions [the justness and reasonableness of the increased rate] preference over the other questions pending before it and decide the same as speedily as possible.

4. The action taken by the Commission in suspending for one day as distinguished from the maximum period permitted by the Act does not constitute final agency action which will cut off petitioners' rights or their opportunity to obtain judicial review of the ultimate agency action. When the hearings before the Commission are concluded and the justness and reasonableness of the filed rates are determined, such rates as so determined (whether those filed by Edison or lower rates if so found by the Commission) will then be effective for the whole of the period commencing after the one day suspension. If petitioners then seek judicial review of such final Commission action, such review will also encompass the full period beginning with the expiration of the suspension. Any amounts collected by Edison during that period in excess of just and reasonable rates, either as initially determined by the Commission or ultimately determined by it following judicial review, will be subject to refund with interest.

Clearly what the Commission decided, in exercising its discretion to suspend for only one day, was that on the face of the data available to it, there was good reason to believe that the newly filed rates were not in excess of the just and reasonable criterion. Having done so, if it suspended

for the maximum potential five month period, Edison would forever be unable to collect the increased rates for that period. Yet, even under those circumstances, such an act of suspension would not have been subject to judicial review at Edison's behest.

The strong presumption in favor of review of administrative action, as set forth in cases cited by petitioners, relates only to "final agency action" and even then is not applicable if there is "persuasive reason to believe that such was the purpose of Congress". *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967). On both counts the petition herein fails. Not a one of the cases cited by petitioners are apposite. *Environmental Defense Fund, Inc.* v. *Hardin*, 428 F. 2d 1093, (CA DC, 1970) and *Barlow* v. *Collins*, 397 U.S. 159 (1970) are primarily standing cases where at risk was the loss of any judicial review whatsoever *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125 (1939) and *Abbott Laboratories*, as well as *Environmental Defense Fund* and *Barlow*, all present instances of review of final agency action.

Phillips Petroleum Co., supra, and *Cities Service Gas Co.* v. *F.P.C.*, 255 F.2d 860 (CA 10, 1958) do not involve the Commission's authority to suspend rates but contract rights between parties and follow the long established rule of *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *F.P.C.* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956). *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (CA DC, 1954), *certiorari denied sub nom. Japan-Atlantic and Gulf Conference* v. *United States*, 347 U.S. 990 (1954), was also a contract case where the Court first determined that the relevant contract did not encompass a dual rate structure. It then ruled that the Maritime Commission was without statutory authority to approve such a structure without having held a hearing and that failure to suspend in that instance was equivalent to approval.

In this case, the petitioners are protected by the provisions of the Federal Power Act and the action of the

Federal Power Commission thereunder in that they will end up paying no more than the rate determined by the Commission subject to judicial review to be just and reasonable.

Petitioners attempt to use the general principal of reviewability of administrative action to forestall the day on which they must begin paying rates which the Commission determines to be just and reasonable. Such an attempt runs counter to the statutory scheme of the Federal Power Act as the Court below ruled in refusing to review the discretionary act of the Federal Power Commission suspending a rate increase for a period less than five months.[3]

5. In the last paragraph of point 3, Petition, at 12, petitioners finally enunciate the premise upon which they dispute the statutory scheme of the Federal Power Act. Tucked into the sentence there contained is the phrase

> . . . : and since refunds are inadequate to provide the requisite protection (*see F.P.C.* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962); *F.P.C.* v. *Hunt*, 376 U.S. 515 (1964)), it is apparent . . .

The statutory scheme of the Federal Power Act creates a Congressional balance between the rights of public utilities and those of its utility customers in regard to the collection of increased rates. In the case of an increased rate, such as is the subject matter of the Petition, it provides a potential five-month period (after 30 days' notice) during which

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[3] It is undoubtedly true that equities are taken into account by the Commissioners in exercising the discretion given them by the Act. There are frequent cases in which all of the Commissioners do not agree upon the equities. *See Gulf Power Co.*, Docket No. E-7686, Order issued January 31, 1972, ____ F.P.C. ____; *Alabama Power Co.*, Docket No. E-7674, Order issued December 30, 1971, ____ F.P.C. ____; *Florida Gas Transmission Co.*, 34 F.P.C. 995, 998 (1965); *Utah Power & Light Co.*, 30 F.P.C. 885, 888 (1963).

the Commission is delegated the authority to decide the application of the Congressional balance. The Commission may decide that the public utility must forever forego collecting its increased rate for the full potential five month period, or the Commission may decide that the utility's customers must pay the increased rates during some of the potential five month period, subject to having refunded to them with interest any part of such increased rates later found in excess of a just and reasonable rate. To help it make its decision the Commission under its rule making power requires the filing of substantial data by the public utility and, by way of public notice, seeks comments of the utility customers and the public. *F.P.C. Regulations* Part 35.8, 18 C.F.R. 35.8 and Part 35.13, 18 C.F.R. 35.13.

Petitioners object to the Congressional balance in this case since the Commission decided that they should pay the increased rates subject to refund during the five month period (less one day). Public utilities have been known to object without success when the Commission decision went the other way.

The public utility has no relief — initially or ultimately — for any period of suspension. See dissent in *Gulf Power Co.*, *supra*, at fn. 3 *infra*. This stands in sharp contrast with any claimed inadequacy of right to receive refunds plus interest if the customer should ultimately prevail.

The petitioners fail to discuss directly the limited point which they raise in their Petition and therefore do not support their bold statement that the "ruling is unsound and, if not reversed, may have important and extensive legal and practical consequences." (Petition, at 7-8).

On the contrary, if this Court were to grant the writ and later reverse the Court below, the result would be to rewrite the Federal Power Act and to foster extensive interlocutory litigation at the expense of the express command of that Act that the Federal Power Commission give preference to the decision of the basic issue of justness and reasonableness of increased rates "and decide the same as speedily as possible."

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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